In the Supreme Court of the United States

OCTOBER TERM 1962

No. 209

EDWARD J. WITZEL

Appellant

vs.

THE STATE OF OHIO

Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL and THE ALTERNATE MOTION TO AFFIRM ORDER APPEALED FROM

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EDWARD J. WETZEL,
Appellant,

vs.

THE STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL and THE ALTERNATE MOTION TO AFFIRM ORDER APPEALED FROM.

PRELIMINARY STATEMENT.

This brief opposing the Appellee's motion to dismiss appeal and its alternate motion to affirm the order appealed from will follow the sequence of the divisions and questions in the Appellee's supporting brief.

Wherever, in Appellant's judgment, a particular issue has been anticipated by the jurisdictional statement reference will be made to the applicable page in that statement without repetition of the material written there.

OUTLINE OF CASE.

The Appellant's statement of the case in the jurisdictional Statement is far more detailed then Appellee's and need not be repeated except to correct the implications from the language on p. 4 of the Appellee's brief:

> It was during this period of time the witnesses testified that the Appellant was frequently seen in the vicinity of the trailer and on one occasion he was seen with another woman who had backed her car up to the trailer (R. 80 and 82) and on another occasion he was seen carrying a package from the trailer approximating the packages of obscene literature (R. 90).

In fact the record nowhere shows that the woman in question backed her car up to the trailer. The record at pages 80 and 82 is silent on the position of her car but at page 83 the colloquy clearly indicates "She was backed up to the barn * * *." This is a small but important point because it does not fit the Appellee's implication that the woman came as a customer for the material stored in the trailer but rather as a prospective purchaser of that vehicle (R. 124-125).

Nor is it accurate to say that the defendant "was seen carrying a package from the trailer approximating packages of obscene literature." Appellee refers to the Record at page 90 but nothing there describes obscene literature. The only thing described is a brown shoe box and it was not, contrary to Appellee's statement, being carried from the trailer. At R. 90 on cross-examination, the witness testified Wetzel was coming from the barn with the box. At R. 91, on re-direct, he repeats himself. There is no conflicting statement in the record.

Preliminary Consideration.

This section of Appellee's brief is directed at Appellant's Motion to Substitute a Party. Appellant has stated the reasons for granting the motion at pages 2 and 3 of the main brief. The cases cited by the appellee do not meet those reasons.

Question 1.

The issues raised by Appellee under this question are met by Appellant in the Jurisdictional Statement at pages 15 and 16. See also the dissent by Judge Taft in *Ohio v. Wetzel*, 173 Ohio St. 16, at page 20 (1962), incorporating the majority reasoning in *Ohio v. Mapp*, 170 Ohio St. 427, at page 433 (1960), and the concurrence in *Ohio v. Jacobellis*, 173 Ohio St. 22, at page 29 (1962).

In connection with the Appellee's contention at page 7 of his brief that the Ohio statute (R. C. 2905.34) requires scienter see Judge Taft's dissent *supra*. Compare also the exact language of R. C. 2905.34 on page 33 in Appendix B of the Jurisdictional Statement beginning "or have in his possession or under his control * * *."

Question 2.

Appellee's treatment of the definition of possession is close to that contained in Appellant's requested charge No. 3[1] refused by the trial court. It is not the definition given in the general charge.

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[1] "By possession it is meant the holding or having as owner or occupier of property; there must have been an intention on the part of the defendant to own or occupy the alleged articles which were offered in evidence and there must have been an actual ownership or occupancy of such articles. If you find, from the evidence, that defendant did not own or occupy the alleged articles, you must find the defendant not guilty."

The faults of the general charge on possession *as given* (R. 135-136) are that it applied a new element—constructive possession[2]—not contemplated by the statute and so nebulous that it failed to meet constitutional standards for criminal statutes (see page 17 of the Jurisdictional Statement).

Question 3.

Appellee again misstates the facts. The evidence is not as Appellee suggests on page 9 that Appellant was seen removing a package from the trailer nor that he was accompanied by a woman in another automobile to the trailer. That the facts so stated support an intent to sell is debatable. In any event, the *actual* facts support that intent even less.

The record is perfectly clear. The "package" in question was a container similar to a "shoe box" and it came from the barn (R. 90-91). The woman in question was a prospective purchaser of the trailer and there is no evidence that she did more than look at the trailer or that her actions at the scene had any of the characteristics of a purchaser of the trailer contents (R. 124-125). Indeed, the record has nothing in it to show either directly or by implication that the contents of the trailer were shown or made known to her. Thus the cases on sales of obscene literature are not relevant. Furthermore, there is not a scintilla of evidence that Appellant knew the trailer's contents (R. 116, 118, 123, 127).

Finally, the indictment did not charge an intent to sell (R. 132). Appellant's conviction on this score is a conviction for a crime not charged and raises its own due process problems.

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[2] A mere holding of keys to property leased by another provides virtually a classic example of constructive possession. (*Cf.* R. 116-117, 122, 124.)

Question 4.

The issues raised by Appellee under this question are met by Appellant in the Jurisdictional Statement at pages 19 and 20.

Question 5.

The substantive issues under this division are: (1) whether a hearsay "tip" from an identified police officer informant is enough, standing alone, to provide that probable cause sufficient to substitute for a search warrant;[3] and (2) whether probable cause founded on such information is sufficient to substitute for a warrant on the facts of the instant case.[4] That is, does the present case fall within the moving vehicle doctrine followed in *Brinegar v. United States*, 338 U. S. 160 (1949), and *Carroll v. United States*, 267 U. S. 132 (1925). Appellant contends both questions require a negative answer.

The Appellee takes seemingly contradictory positions on the issue of timely objection to the admission of the product of the *warrantless* search. If that contradiction be resolved by the distinction that the Appellant's ground of objection was never that the evidence was the product of an illegal search, then the obvious rejoinder is that this basis for objection was added to others at the earliest opportunity after the decision in *Mapp v. Ohio*, 367 U. S. 643 (1961) (see Appellant's Jurisdictional Statement at pages 21-23).

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[3] See *Scher v. United States*, 305 U. S. 251 (1938); *Worthington v. United States*, 166 F. 2d 357 (6th Cir. 1948); *United States v. Bianco*, 94 F. Supp. 239 (W. D. Pa. 1950), Rev'd on other grounds, 189 F. 2d 716 (3rd Cir. 1951).

[4] See *Henry v. United States*, 361 U. S. 98 (1959).

CONCLUSION.

For the reasons adduced in this brief and in Appellant's Jurisdictional Statement, the Appellee's motion to dismiss this appeal or, in the alternative to affirm the order appealed from, should be denied.

Respectfully submitted,

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